

Vaccine Mandates And Vaccine Bans – Clues On Where This Ends And Making Decisions In The Interim

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On September 9, 2021, [President Biden announced plans](#) for the federal Occupational Safety and Health Administration (OSHA) to issue an “Emergency Temporary Standard” (ETS) mandating that all employers with more than 100 employees ensure their workers are either fully vaccinated against COVID-19 or produce, on a weekly basis, a negative COVID test. This came in the wake of the president’s issuance of two executive orders mandating vaccination for all executive branch employees and requiring vaccination for employees of federal contractors, hospitals, and other institutions receiving federal funding. Some states and municipalities have joined the fray, themselves issuing mandatory vaccination requirements.

In these polarized times, blowback from such mandates is not all that surprising. [Montana was first to act](#), banning vaccine requirements as a condition of employment as discrimination, in violation of the state’s human rights laws. Early last week, Texas Governor Abbott issued an executive order prohibiting Texas employers from requiring vaccinations of employees who object on a religious basis, for medical reasons, or for the completely undefined “any reason of personal conscience.” The very next day, [OSHA sent its proposed ETS to the White House](#) for final review, indicating that publication of the ETS is imminent (and may very well have happened by the time of this article’s publication). Meanwhile, many expect the countermoves by Montana and Texas will be replicated, in some fashion, in other states.

Whatever your thoughts on these dizzying symptoms of the ongoing American culture war over vaccines, employers operating in states imposing bans or limitations on vaccine mandates justifiably can feel “damned if you do, damned if you don’t” in a moment where critical decisions are necessary. While nothing is certain at this point, some waypoints can prove useful to plotting a course.

We can start with the general trend that the federal courts have shown themselves largely hostile to legal claims and efforts to challenge vaccination requirements and other federal-level steps implemented in response to the pandemic. While both the federal rulemaking and state law bans of such mandates are sure to generate further litigation, at least for the moment, the trend has been for courts to find government-imposed vaccine requirements to be a proper exercise of government “police power” to protect public health.

Over the longer term, given that the policy of vaccine mandates is happening at a federal level and the pushback is at the state level, the question of federal preemption will be critical. At a fundamental level, the Supremacy Clause of the Constitution prohibits states from passing laws at odds with federal law and regulation, which has in turn resulted in the development of several “preemption” doctrines. Depending on the type of employer you are, some potential clues for how preemption might affect you are available:

Federal contractors and qualifying health care employers receiving federal funding: While there are no guarantees, it looks like a reasonable bet that the Biden Administration’s vaccine mandates will preempt any state laws to the contrary, including the recent Montana and Texas actions. The federal government has the power to place conditions on the receipt of federal funds and federal projects and engagements, and state law action at odds with such federal authority would clearly interfere with the exercise of such authority. While there is no bulletproof insulation from legal challenge or litigation, employers in this group should feel reasonably confident about following applicable federal requirements, even if they are at odds with state laws banning vaccine mandates.

Employers with 100 or more employees: While the implementation of federal policy via the OSHA ETS appears imminent, it is critical to understand that there will not be the possibility of federal preemption of state law vaccine bans until the OSHA ETS itself becomes effective and has the force of law. Once that occurs, and assuming legal challenges to OSHA’s ability to publish and enforce the ETS are rejected, federal preemption is a good bet here as well. However, unlike the executive order mandating vaccinations for all federal employees and employees of federal contractors, the OSHA ETS is expected to still allow for weekly negative COVID tests as an alternative to mandatory vaccination. That said, the Montana outright ban on vaccinations, as well as Texas’s ban on vaccination requirements for “any reason of personal conscience,” seems likely to interfere with OSHA’s exercise of authority governing workplace safety.

Employers with fewer than 100 employees: Things become far more murky at this level, because by its own terms the OSHA ETS does not cover these “smaller” employers, and therefore no clear federal policy exists with which state law overtly interferes. However, the United States Supreme Court has carved out two different types of federal preemption under the National Labor Relations Act that could apply to this group of employers. While any analysis of such preemption would require discussion far outside the space constraints of this article, this author expects that legal challenges against state law vaccine bans as a potential interference with labor relations within the NLRA preemption doctrines will occur. Consequently, even employers not covered by the OSHA ETS operating in states with barriers to mandatory vaccination could see such state law action deemed invalid. (As a note of academic interest, under this same theory state or local law action mandating vaccination could also be subject to challenge as equally preempted by federal labor policy.)

Whatever type of employer you are from this list, it is critical to keep in mind that even as you try to comply with the law and plan for the future, the legal landscape on vaccinations and vaccine bans will rapidly evolve, and nothing from the above should be interpreted as a guarantee of outcomes. However, savvy employers understand that sitting back and waiting for the chips to fall is probably not the smartest strategic course of action either, and some degree of informed prediction is critical to the necessary decision making facing employers. We urge you to work closely with legal counsel to navigate decisions regarding both how vaccine mandates and vaccine bans apply to you and how to make the strategic and compliance decisions necessary to “do the right thing” for your business.

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